Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

NO. 92-1499

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,
Petitioner,

vs.

COLONIAL, INC.
Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF IN SUPPORT OF IT'S PETITION FOR WRIT OF CERTIORARI

Stewart I Mandel, **Counsel of Record**

Suite 650, 75 Public Square Building

Cleveland, Ohio 44113

(216) 241-5115

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

REPLY 1

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Board of Health v Greenville,
86 Ohio St 1, 39 (1912) 4

Brown v State, ex rel.,
120 Ohio St 297, 304 (1920) 5

Webb v Webb, 451 U S 493, 501 (1981)..... 2

Other Authorities Cited

Ohio Constitution, Article II,
Section 26 4,5,6

Fourteenth Amendment to the United States
Constitution, Section 1 6

NO. 92-1499

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,
Petitioner,

vs.

COLONIAL, INC.
Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF IN SUPPORT OF IT'S PETITION FOR WRIT OF CERTIORARI

The Respondent, by relying on **Webb v Webb 451 U S 493**, apparently concedes Justice Powell and Justice Brennan's concurring opinion at page 501 of the opinion,

> "..... that this court has jurisdiction to review plain error unchallenged in state court when necessary to prevent fundamental unfairness."

Petitioner contends that this court has jurisdiction to review plain error that was unchallenged in the state court because of the fundamental unfairness of the Supreme Court of Ohio decision. Also, Petitioner has raised the federal constitutional question at it's earliest opportunity in this petition for a writ of certiorari; and the state courts below were afforded a fair opportunity to address the federal questions sought to be presented here, since in deciding Respondent's constitutional challenge on uniformity the courts below were implicitly and necessarily dealing with the legal concept of equal

protection of the laws that is clearly intertwined with the concept of uniformity.

It is plain error for the Supreme Court of Ohio to judicially construe a limited vacation of a state sales tax pre-emption in favor of certain island municipalities as a law of a general nature requiring uniformity and is fundamentally unfair find to those statutes unconstitutional.

The error is plain because both pre-emptions and the limited vacation of a sales tax pre-emption are basically judicial concepts and are not laws of a general nature requiring uniformity. It is fundamentally unfair because municipalities have the constitutional right and power to levy a sales tax except for the pre-emptive effect of the Ohio Sales Tax Act.

Further, the vacation of the sales tax pre-emption in favor of Ohio islands, not connected to the mainland by a bridge, is a

reasonable classification because of the special circumstances of those islands.

As stated in **Board of Health v. Greenville, 86 Ohio St.1**, at page 39 (1912):

> It has been repeatedly held by this court that where a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state. **State, ex rel., v. Spellmire, 67 Ohio St. 77; Cincinnati v. Steinkamp, 54 Ohio St. 284; McGill v. State, 34 Ohio St., 228; State, ex rel., v. Bargus, 53 Ohio St. 94.**

It is obvious that the vacation of the pre-emption operates wherever there is an Ohio island not connected to the mainland by a bridge and the statues in question qualify under the definition of uniformity stated above, notwithstanding Petitioner's contention they are not legally required to be uniform.

The Ohio Supreme Court's judgments on the issue of uniformity under Article II Section 26 of the Ohio Constitution are

admittedly wholly irreconcilable. As stated in **Brown v. State, ex rel, 120 Ohio St.297**, at page 304 (1929) the court stated:

> The pronouncements of this court in the past have not always been consistent or harmonious. Without any change in the language of Section 26 of Article II, the changing personnel of this court and the changing conditions of human progress have brought fluctuations in decisions which must be accounted for partly on the theory of a different trend of thought and a different attitude toward local control of local conditions. It would be futile to attempt to reconcile all of them, for the reason that they are wholly irreconcilable....

Petitioner is denied equal protection of the laws under the U.S. Constitution because Ohio judgments construing uniformity under Article II, Section 26 of Ohio's Constitution, by the Ohio Supreme Court's own admission, cannot be reconciled.

Uniformity and equal protection of the laws, if they are not identical concepts,

are certainly kissing cousins. Because of the nexus of these concepts one to the other, it is manifest that the state courts below in dealing with Respondent's challenge to Article II Section 26 of the Ohio Constitution had a fair opportunity to deal with the equal protection of the laws under the United States Constitution in adjudicating that issue.

It would seem that all the courts below in dealing with Article II Section 26 of the Ohio Constitution would be mindful of the equal protection of the laws issue of the Fourteenth Amendment to the U S Constitution because the legal concepts are so similar in purpose as to be nearly identical.

Petitioner contends that it is entitled to the foregoing inference under the presumption of regularity of the proceedings below.

CONCLUSION

For all the above reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Stewart I Mandel,
Counsel of Record
75 Public Square Building
Suite 650,
(216) 241-5115

Counsel for Petitioner